

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CONOCOPHILLIPS COMPANY, a )  
Delaware corporation, )  
Plaintiff(s), )  
v. )  
INTERNATIONAL MARINE FUELS )  
GROUP, INC., a California )  
corporation, and ROBERT )  
FALCHE, an individual and )  
personal guarantor, )  
Defendant(s). )

No. C10-00624 BZ

**REPORT AND RECOMMENDATION ON  
PLAINTIFF'S MOTION FOR ENTRY  
OF DEFAULT JUDGMENT AND  
AWARD OF ATTORNEYS' FEES AND  
COSTS**

Plaintiff ConocoPhillips Company applies for entry of default judgment, joint and severally, against defendants International Marine Fuels Group, Inc. ("International Marine") and International Marine's President, Robert Falche, for breach of contract. Defendants have not answered plaintiff's complaint, appeared in this action, or responded to plaintiff's application for default judgment. In addition, defendants have not consented to my jurisdiction pursuant to 28 U.S.C. § 636(c). This matter will therefore be reassigned to a District Judge with the following report and recommendation.

On May 20, 2010, plaintiff filed its first amended complaint ("FAC") to enforce a promissory note, personal

1 guarantee, and other obligations related to the sale of fuel  
2 products to the defendants. Docket No. 7. Plaintiff alleges  
3 that it has supplied International Marine with fuel on credit,  
4 under the terms agreed upon by the parties in the Unbranded  
5 Open Rack Sales General Terms & Conditions ("Rack Terms and  
6 Conditions"), and has performed all terms, covenants, and  
7 conditions required of it. FAC Exh. A; FAC ¶ 38. It also  
8 alleges that Falche executed and delivered a personal  
9 guarantee in which he guaranteed International Marine's  
10 obligations under the Rack Terms and Conditions and, in the  
11 event of default, the cost of collections and attorneys' fees.  
12 FAC ¶ 38; FAC Exh. B.

13 Plaintiff alleges that defendants failed to make numerous  
14 payments in 2008 and 2009 and defaulted on their debt. FAC ¶  
15 13. By May 2009, this debt had accumulated to approximately  
16 \$747,316.33. FAC ¶ 14. In response, International Marine  
17 executed and delivered a \$747,316.33 promissory note to  
18 plaintiff. FAC ¶ 15. The note stated, in part, that full  
19 payment of the principal balance was due on August 31, 2009.  
20 FAC ¶ 16; FAC Exh. C at § 1-2. It further stated that upon  
21 any "event of default,"<sup>1</sup> International Marine would owe  
22 interest accruing from the date of default and that the entire  
23 amount of principal and interest would become due and payable  
24 immediately. FAC ¶¶ 17, 18; FAC Exh. C at § 6-7. The

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26 <sup>1</sup> The promissory note recognizes several scenarios that  
27 might qualify as "events of default." This agreement went into  
28 default under § 7(F) of the promissory note which states,  
"Promissor fails to make full and final payment of the amount  
then due and payable upon Maturity Date of this note ..." FAC  
Exh. C at § 7(F).

1 promissory note provided for reimbursement "on demand for all  
2 legal fees and other costs and expenses including ... legal  
3 fees, court costs, and collection agency charges incurred in  
4 the collection or enforcement of [the promissory note]." FAC ¶  
5 19; FAC Exh. C at § 7.

6 Plaintiff's complaint asserts that by August 31, 2009  
7 defendants had not made any payments on the promissory note or  
8 pursuant to the personal guarantee. FAC ¶ 20. Falche had  
9 personally guaranteed all debts incurred to plaintiff by  
10 International Marine under the Rack Terms and Conditions. FAC  
11 Exh. B. After a "Final Demand Letter & Personal Guaranty  
12 Notice" was sent to defendants on September 2, 2009,  
13 International Marine made two payments of \$5,000 each. FAC ¶¶  
14 23, 24. Plaintiff contends that defendants have made no  
15 further payments. FAC ¶ 25.

16 In addition, plaintiff alleges that defendants have an  
17 additional obligation to pay \$38,254.27 for three fuel  
18 shipments made in 2006 and 2007 but not invoiced at those  
19 times.<sup>2</sup> FAC ¶ 27; FAC Exh. F. These unpaid shipments were  
20 discovered subsequent to defendants' default on the promissory  
21 note. FAC ¶ 27. Consequently, they were not included in the  
22 principal stated in the promissory note. FAC ¶ 28.

23 Plaintiff commenced this action for breach of contract  
24 and served defendants in February 2010. Docket Nos. 1, 4, 5.  
25 Neither defendant answered the complaint. In May 2010,

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27 <sup>2</sup> The uninvoiced amounts were: (1) \$21,796.85 for a  
28 June 15, 2007 shipment; (2) \$14,063.97 for a September 2, 2006  
shipment; and (3) \$2,393.45 for a July 14, 2006 shipment.

1 plaintiff filed a first amended complaint and served  
2 defendants with its amended pleading. Docket Nos. 7, 10, 11.  
3 Again, neither defendant filed an answer and neither have  
4 appeared in the case. The clerk, therefore, entered default  
5 against Falche and International Marine. Docket Nos. 14, 17.

6 Pursuant to Rule 55(b)(2), the Court may enter a default  
7 judgment against a party against whom default has been  
8 entered. The decision to grant or deny a default judgment  
9 under Rule 55(b) is within the discretion of the Court.

10 Shanghai Automation Instrument Co. Ltd. v. Kuei, 194 F.Supp.2d  
11 995, 999 (N.D. Cal. 2001). Although a formal hearing is not  
12 required for a court to render a default judgment, plaintiffs  
13 have the burden of proving damages through testimony, written  
14 affidavit, or other relevant evidence. Bd. of Trs. of the  
15 Boilermaker Vacation Trust v. Skelly, Inc., 389 F.Supp.2d  
16 1222, 1225-26 (N.D. Cal. 2005). To support its motion for  
17 default judgment, plaintiff has submitted evidence that the  
18 defendants are not minors, incompetent, or currently serving  
19 in the military.<sup>3</sup>

20 By their default, defendants are deemed to have admitted  
21 the well-pleaded averments of the complaint except those as to  
22 the amount of damages. Fed. R. Civ. P. 8(d); Bd. of Trs. of

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24 <sup>3</sup> A court may not enter a default judgment against an  
25 unrepresented minor, an incompetent person, or a person in  
26 military service. Fed. R. Civ. P. 55(b)(2); 50 U.S.C. App. §  
27 521. Defendant International Marine, as a corporation, is not  
28 subject to these limitations. Regarding defendant Falche,  
plaintiff's counsel submits that Falche is a competent adult  
and is not known to be engaged in military service, but rather  
works and resides within this judicial district. Docket No. 21,  
n. 3.

1 the Boilermaker Vacation Trust, 389 F.Supp.2d at 1224.  
2 Plaintiff's pleadings have therefore sufficiently alleged  
3 facts to support a breach of contract claim.<sup>4</sup> For this  
4 breach, plaintiff seeks damages and has moved for an entry of  
5 default judgment.

6 In its Motion for Entry of Default Judgment and Award of  
7 Attorneys' Fees, plaintiff seeks damages totaling \$775,570.60  
8 as a result of defendants' breach of contract. Docket No. 21.  
9 This includes \$737,316.33 for breach of the promissory note  
10 and personal guarantee and \$38,254.27 for fuel deliveries that  
11 occurred in 2006 and 2007. Id. Plaintiff also seeks interest  
12 on the unpaid principal of the promissory note and prejudgment  
13 interest on its claim for unpaid fuel deliveries. Id.  
14 Furthermore, plaintiff seeks attorneys' fees and costs of  
15 collection associated with this litigation in the amount of  
16 \$35,551.77. Id. In Texas, the appropriate amount of damages  
17 for breach of contract is "that which restores the injured  
18 party to the economic position he would have enjoyed if the  
19 contract had been performed." Mood v. Kronos Products Inc.,  
20 245 S.W.3d 8, 13 (Tex. App. Dallas 2007). Plaintiff has  
21 submitted a copy of the original sales contract (Rack Terms  
22 and Conditions), the personal guarantee signed by Falche, the  
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24 <sup>4</sup> The essential elements for a breach of contract claim  
25 in Texas are that a valid contract existed, plaintiff  
26 performed, defendant breached, and plaintiff suffered resulting  
damages. Bank of Tex. v. VR Elec., 276 S.W.3d 671, 677 (Tex.  
App. Houston 2008).

27 Pursuant to the parties' choice of law provisions,  
the Rack Terms and Conditions, personal guarantee, and  
28 promissory note are governed by the laws of the State of Texas.  
FAC Exh. A at § 9; FAC Exh. B; FAC Exh. C at § 12(a).

1 promissory note, and invoices for the 2006-2007 unpaid fuel  
2 shipments to prove damages. FAC Exh. A; FAC Exh. B; FAC Exh.  
3 C.; FAC Exh. F. Plaintiff is entitled to \$775,570.60<sup>5</sup> because  
4 defendants breached the payment terms of the Rack Terms and  
5 Conditions, personal guarantee, and promissory note.

6 In addition, plaintiff may claim interest on the unpaid  
7 principal balance stated in the promissory note, \$737,316.33.  
8 Docket No. 21. When a contract specifies a rate of interest  
9 as a damage, the courts will award that rate of interest,  
10 subject only to usury limitations. Bair Chase Property Co.,  
11 LLC v. S & K Development Co., Inc., 269 S.W.3d 133, 138-40  
12 (Tex. App. Austin 2008); Tex. Fin. Code **§§** 302.001(b),  
13 304.103, 304.002. Based on the promissory note, plaintiff may  
14 claim interest at the rate of 6.25 percent.<sup>6</sup> Thus, plaintiff  
15 is entitled to \$53,354.58 as interest on the unpaid balance of  
16 the promissory note.

17 Plaintiff also seeks statutory prejudgment interest on  
18 its claim for \$38,254.27 for fuel deliveries made during 2006  
19 and 2007. Docket No. 5. Awards of prejudgment interest in  
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21 <sup>5</sup> As mentioned *supra*, this includes \$737,316.33 for  
22 breach of the promissory note and personal guarantee and  
23 \$38,254.27 for unpaid fuel deliveries made under the Rack Terms  
and Conditions.

24 <sup>6</sup> The promissory note allows for an interest rate of  
25 prime plus three to five points per annum upon an event of  
26 default. FAC Exh. C at § 6. Plaintiff has calculated an  
27 interest rate at the minimum allowed for under the Rack Terms  
28 and Conditions (prime plus three points). The prime rate is  
currently 3.25 percent. Bd. of Governors of the Fed. Reserve  
Sys., *Selected Interest Rates (Weekly)*,  
<http://www.federalreserve.gov/releases/h15/Current/> (last  
visited Oct. 20, 2010). Accordingly, plaintiff is awarded  
interest at the rate of 6.25 percent.

1 diversity cases are governed by state law where the  
2 substantive claim does not derive solely from federal law. Oak  
3 Harbor Freight Lines, Inc. v. Sears Roebuck, & Co., 531 F.3d  
4 949, 961 (9th Cir. 2008). Plaintiff made these deliveries  
5 pursuant to the Rack Terms and Conditions. Thus, they are  
6 expressly governed by Texas law as stated in the choice of law  
7 provision. FAC Ex. A at § 9. In Texas, prejudgment interest  
8 is "available as a matter of right where an ascertainable sum  
9 of money is determined to have been due and payable at a date  
10 certain prior to judgment." West Beach Marine v. Erdeljac, 94  
11 S.W.3d 248, 266 (Tex. App. Austin 2002) (citing Republic Nat'l  
12 Bank v. Northwest Nat'l Bank, 578 S.W.2d 109, 116 (Tex.  
13 1979)). In the present case, prejudgment interest has been  
14 set at a rate of five percent.<sup>7</sup> Thus, plaintiff is entitled  
15 to statutory prejudgment interest of \$1312.32 for amounts owed  
16 on unpaid fuel shipments.

17 Plaintiff also seeks an award of attorneys' fees  
18 associated with this litigation in the amount of \$34,271.80.  
19 Plaintiff may claim attorneys' fees under provisions of the  
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21 <sup>7</sup> Texas statute provides that prejudgment interest  
22 accrues at the same rate as postjudgment interest awarded for  
23 breach of contract, and, when not specified, is determined by  
24 the Texas Consumer Credit Commissioner. Tex. Fin. Code Ann. §§  
25 304.104, 304.003(b). The current rate for prejudgement  
26 interest has been set at five percent. Tex. Office of the  
27 Consumer Credit Comm'r, *Interest Rates*,  
28 [http://www.occc.state.tx.us/pages/int\\_rates/Index.html](http://www.occc.state.tx.us/pages/int_rates/Index.html) (last  
visited Oct. 20, 2010). "Prejudgment interest accrues on the  
amount of a judgment during the period beginning on the earlier  
of the 180th day after the date the defendant receives written  
notice of a claim or the day the suit is filed and ending on  
the day preceding the date judgment is rendered ... [It] is  
computed as simple interest and does not compound." Tex. Fin.  
Code Ann. § 304.104.

contracts because defendants have expressly consented to reimburse fees related to litigation. FAC Exhs. B, C at §9. In addition, Texas law authorizes awards for plaintiff's reasonable attorneys' fees in contract disputes. Tex. Civ. Prac. & Rem. Code § 38.001. To calculate reasonable attorneys' fees, the court should calculate the lodestar amount by "multiply[ing] the reasonable number of hours worked by a reasonable hourly rate." Bates v. Randall County, 297 S.W.3d 828, 838 (Tex. App. Amarillo 2009). Plaintiff claims attorneys' fees of \$23,826.00 from outside counsel and \$10,445.80 from in-house counsel. Docket No. 21. In support of its request for attorneys' fees, plaintiff has submitted billing statements from outside counsel and in-house counsel, including services provided by paralegals.<sup>8</sup> Docket Nos. 22, 25. Plaintiff's outside counsel declares that rates charged by his firm were below lawyers of comparable skill and experience in the Bay Area.<sup>9</sup> Docket No. 22 ¶ 12. Plaintiff's outside counsel also declares that the hours expended by his

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<sup>8</sup> The term "attorneys' fees" includes fees charged for paralegal services may be charged at "market rate". Richlin Sec. Service Co. v. Chertoff, 533 U.S. 571, 571 (2008). However, paralegal fees are only recoverable to the extent that they are for work traditionally done by an attorney and not administrative or ministerial tasks. All Seasons Window and Door Mfg., Inc. v. Red Dot Corp., 181 S.W.3d 490, 504 (Tex. App. Texarkana 2005).

<sup>9</sup> Plaintiff's outside counsel billed \$310.00 per hour in 2009 and \$330.00 in 2010. In addition, associates working on this case were billed at \$210.00 per hour in 2009 and \$225.00 in 2010, and paralegals were billed at \$120.00 per hour. Docket No. 22 ¶¶ 7, 9, 10.



1 firm were necessary to the litigation of this case.<sup>10</sup> Docket  
 2 No. 22 ¶ 11. Having reviewed the declarations provided by  
 3 plaintiff's outside counsel, I am satisfied that their hourly  
 4 rates and hours charged for work performed are reasonable for  
 5 this case and their level of experience.

6 Plaintiff's in-house counsel declares that the hours  
 7 expended by plaintiff's legal department were necessary for  
 8 the collection of amounts due and the subsequent litigation of  
 9 this case. Docket No. 25. Texas law permits the award of fees  
 10 generated from in-house counsel by using the "market value  
 11 method" but not the "cost-plus method."<sup>11</sup> AMX Enterprises,  
 12 L.L.P. v. Master Realty Corp., 283 S.W.3d 506, 519 (Tex. App.  
 13 Fort Worth 2009). Plaintiff's in-house counsel seeks hourly  
 14 fees in the form of a variable rate calculated from the actual  
 15 cost and overhead of his department's legal services.<sup>12</sup> As  
 16 explained above, this method of calculating in-house legal  
 17 fees is not allowed under Texas law, but must be determined by

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 19 <sup>10</sup> As shown in plaintiff's outside counsel's billing  
 20 statements, the bulk of time was spent in research, client  
 21 communication, and preparation of the complaint and amended  
 22 complaint, approximately 45 hours. The remainder of the hours  
 billed were for research; client communication; drafting the  
 motion for default, approximately 12 hours; and drafting the  
 motion for default judgment, approximately 20 hours.

23 <sup>11</sup> "Market value" refers to the customary rates charged  
 24 in the locality for similar legal services. AMX Enterprises,  
L.L.P., 283 S.W.3d at 519. "Cost-plus method" refers to rates  
 25 determined by claimant's actual cost of employing in-house  
 counsel. Id. at 517.

26 <sup>12</sup> Plaintiff's in-house counsel has submitted billing at  
 27 a variable hourly rate. Docket No. 25. This rate was  
 28 calculated and dependent on his department's internal budget  
 and overhead. Id. The rates charged were at an average of  
 \$430.00 per hour for attorneys and \$160.00 per hour for  
 paralegals.

1 using the "market value" approach. Furthermore, plaintiff's  
2 outside counsel does not provide any reason or justification  
3 for fees that are substantially higher than those of  
4 plaintiff's outside counsel. Accordingly, I am not satisfied  
5 that hourly rates submitted by plaintiff's in-house counsel  
6 are reasonable. In-house counsel also fails to submit detailed  
7 descriptions of their work on this case.<sup>13</sup> Based on these two  
8 reasons, I do not recommend awarding fees for in-house work.

9 Finally, plaintiff claims additional costs and expenses  
10 associated with this litigation in the amount of \$1,279.97.  
11 Under the personal guarantee and promissory note, defendants  
12 have expressly consented to reimburse plaintiff for costs  
13 related to litigation and collection. FAC Exhs. B, C at §9.  
14 In support of this claim, plaintiff has submitted billing and  
15 receipts for associated costs. Docket Nos. 22, 25. I am  
16 satisfied that these costs are reasonable.

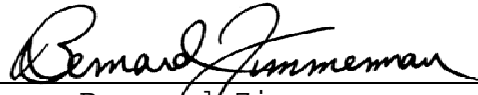
17 For the foregoing reasons, I recommend that Judgment be  
18 entered in plaintiff's favor against defendants International  
19 Marine Fuels Group, INC. and Robert Falche, joint and  
20 severally, for \$854,343.47. This amount includes \$737,316.33  
21 for breach of the promissory note and personal guarantee and  
22 \$52,354.58 in interest due on that amount. It also includes  
23 \$38,254.27 for fuel deliveries that occurred in 2006 and 2007  
24 and \$1,312.32 in interest due on that amount. Finally, it  
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26 <sup>13</sup> Plaintiff's in-house counsel declares that  
27 plaintiff's legal department spent 33.25 hours on this matter,  
28 including 9 hours of paralegal services and 24.25 hours of  
attorney services, but does not specify how these hours were  
spent. Docket No. 25.

1 includes \$23,826.00 for fees generated by outside counsel and  
2 \$1,279.97 for associated costs of collection and litigation.

3 Dated: October 20, 2010

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5 Bernard Zimmerman  
United States Magistrate Judge

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7 RECOMMENDATION.wpd  
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